



March 22, 2016

Mr. Bo Botelho
Materiel Division Administrator
Administrative Services
P.O. Box 94847
Lincoln, NE 68509-4847

VIA HAND DELIVERY

Materiel Division
Administrative Services
1526 K Street, Suite 130
Lincoln, NE 68508

RE: Protest by AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan relating to Request for Proposal (RFP) 5151Z1

Dear Administrator Botelho:

AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan ("Arbor Health") hereby protests the State of Nebraska's intent to award contracts to UnitedHealthcare of the Midlands, Inc., Nebraska Total Care, Inc., and WellCare of Nebraska, Inc. to provide Medicaid managed care services and FFS claim broker services pursuant to the RFP referenced above, as posted on March 8, 2016 (the "Award").

Arbor Health previously protested the first intent to award contracts posted in connection with the RFP, as posted February 5, 2016 (the "Prior Award") by letter dated February 19, 2016 (the "Prior Protest"). Arbor Health incorporates herein by this reference all arguments contained in its Prior Protest. Then-current Nebraska Department of Administrative Services – Materiel Division Administrator Marilyn Bottrell ("Administrator Bottrell") responded to Arbor Health's Prior Protest by letter dated March 1, 2016 (the "Response"). The Response indicated that State Purchasing Bureau ("SPB") would rescind the Prior Award, which it did by Notice of Withdrawal of Intent to Award dated February 29, 2016 (the "Withdrawal").

After issuing the Withdrawal in response to Arbor Health's Prior Protest, SPB had the Corporate Overview section of the RFP "re-evaluated and scored accordingly by new evaluators" (collectively, the "Reevaluation") and based the Award on the evaluation criteria used in the Reevaluation. See Response, Section A, p. 1. The Award as posted March 8, 2016 is the subject of this letter (this "Protest").

Arbor Health is awaiting responses from the Nebraska Department of Health and Human Services ("DHHS") to multiple document requests, and DHHS has not provided a definitive date for response to such document requests. Arbor Health reserves its right to supplement this

Protest and the arguments herein upon receipt and review of responses to its outstanding document requests. This Protest deals only with the Award, and not with the Prior Award. Arbor Health reserves all of its rights to continue the Prior Protest or otherwise dispute the Prior Award.

Based on an analysis of the RFP, the proposals submitted by each bidder, and the scoring sheets and related materials, Arbor Health has identified significant and material deficiencies, errors and inaccuracies in the RFP and the scoring and evaluation of the proposals submitted in connection therewith, including, without limitation, the Reevaluation. As a result of those deficiencies, errors and inaccuracies, neither the RFP nor the Award is compliant with applicable Nebraska law, as more specifically set forth hereinafter. The Award is arbitrary and should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

The points of contact for purposes of this Protest are Thomas J. Culhane and William T. Foley, Erickson | Sederstrom, P.C., L.L.O., 10330 Regency Parkway Drive, Suite 100, Omaha, Nebraska 68114. You may also call Mr. Culhane or Mr. Foley at 402-397-2200 or e-mail them at tculh@eslaw.com and wfoley@eslaw.com, respectively.

As specifically set forth in the Prior Protest, the evaluation criteria used in connection with the RFP violated Nebraska law and the express terms of the RFP. Moreover, errors and inconsistencies in the scoring of the RFP demonstrated a lack of proper control and oversight over the scoring process, resulting in an arbitrary award. Because the Award was arbitrary, it should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

I. THE REEVALUATION DID NOT REMEDY THE FAILURE OF THE RFP TO COMPLY WITH NEBRASKA LAW.

The Reevaluation was contrary to Nebraska law. Furthermore, the statutory and regulatory factors that must be considered in awarding contracts under the RFP have not been properly considered in scoring the RFP. The RFP is contrary to Nebraska law, and does not provide any proper basis for the Award. Accordingly, the Award should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

A. THE REEVALUATION CONFLICTED WITH NEBRASKA LAW AND FURTHER RENDERED THE RFP AND THE AWARD LEGALLY DEFICIENT.

Rather than remedying the legal deficiencies of the RFP and the evaluation criteria thereunder, implementing the Reevaluation violated Nebraska law. The Award should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

Nebraska Revised Statutes § 73-504(2) provides, in relevant part, "All proposed state agency contracts for services in excess of fifty thousand dollars shall be bid in the manner prescribed by the division procurement manual or a process approved by the Director of Administrative Services." Accordingly, the DAS State Purchasing Bureau's Agency

Procurement Manual for Services¹ (hereinafter, the "Manual") has the effect of Nebraska statutory law. Under the Manual, "[t]he evaluation criteria MUST be developed and submitted with the requisition. The evaluation criteria should be developed simultaneously with the requirements of the RFP" (emphasis in original). Manual, Section III.F.3.b.iii, p. 13. Per the Manual, the evaluation criteria developed in connection with an RFP must "[d]etail how much each criterion is worth." Manual, Section III.F.3.c, p. 14. Moreover, "RFPs can *only* be evaluated according to the stated criteria..." (emphasis in original). Manual, Section III.F.3.b.i, p. 13.

In this case, the RFP was posted October 21, 2015. After issuing the Prior Award, SPB issued the Withdrawal and then made certain changes to the evaluation criteria upon which the RFP was scored, and specifically to how much each criterion was worth. However, under the express terms of the Manual, the evaluation criteria must be developed simultaneously with the requirements of the RFP and submitted with the requisition. See Manual, *supra*. Moreover, "the RFP will not be released without the evaluation pieces being completed." Manual, Section III.F.5.f, p. 15. The new evaluation criteria implemented in the Reevaluation were not developed simultaneously with the requirements of the RFP, but "[a]s a result of protests received in connection with" the RFP. See Withdrawal. Such evaluation criteria were certainly not developed and submitted with the requisition, as required by Nebraska law.

Because the Reevaluation was based upon evaluation criteria that were not developed simultaneously with the requirements of the RFP or developed and submitted with the requisition, in contravention of the express and emphatic provisions of Nebraska law, the Reevaluation was in direct violation of Nebraska law. Accordingly, implementing the Reevaluation did not remedy the defects in the RFP and the evaluation criteria. Rather, implementing the Reevaluation further rendered the RFP and the Award contrary to law, and provided independently sufficient grounds to overturn the Award.

B. THE STATUTORY AND REGULATORY FACTORS REQUIRED TO BE CONSIDERED IN
AWARDING A CONTRACT UNDER THE RFP WERE NOT PROPERLY CONSIDERED.

The RFP and the evaluation criteria did not allow for proper consideration of the factors required to be considered in determining the lowest responsible bidder. The deficiency in the RFP and the evaluation criteria was not remedied by the Reevaluation. Because the RFP and the Award failed to comply with Nebraska law, the Award should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

Under Nebraska law, all contracts which by law are required to be based upon competitive bids must be made to the lowest responsible bidder. Neb. Rev. St. § 81-161(1). Nebraska law requires that certain elements be considered in determining the lowest responsible bidder, including the following: the character, integrity, reputation, judgment, experience, and efficiency of the bidder; the quality of performance of previous contracts; and the previous and

¹ Found at
http://das.nebraska.gov/materiel/purchase_bureau/docs/manuals/Agency%20Procurement%20Manual%20for%20Services%20October%202015.pdf

existing compliance by the bidder with laws relating to the contract (the "Statutory Factors"). Neb. Rev. St. § 81-161(2); 9 NAC 4-001.

The only portions of the RFP that solicited information from bidders related to the Statutory Factors were in the Corporate Overview section of the RFP. Specifically, there were four questions that solicited relevant information, which questions were more specifically described in the Prior Protest and defined as the "Non-Discretionary Questions." As more specifically set forth in the Prior Protest, the original format of the Non-Discretionary Questions did not allow for proper substantive consideration of the Statutory Factors.

Through the Reevaluation, SPB altered the evaluation criteria to allow evaluators discretion to award any number of points up to the maximum for the Non-Discretionary Questions. But this backward-looking solution did not cure the deficiency of the RFP and the evaluation criteria. DHHS and DAS were required by the Manual to create and implement evaluation criteria for the RFP that properly accounted for the Statutory Factors. This obligation included developing questions intended to elicit information relevant to the Statutory Factors, and assigning point values to those questions sufficient, under Nebraska law, to allow proper distinction and separation among bidders based upon the responses. As the evaluation criteria were originally submitted, the Non-Discretionary Questions required the evaluators to enter one of either two (2) or three (3) point values based upon whether a response was submitted and whether the response was deemed complete.

As indicated by the Response, the Withdrawal, and the adoption of the Reevaluation in response to the Prior Protest, SPB conceded the deficiency of the evaluation criteria. SPB has not remedied the deficiency by altering the evaluation criteria after the fact, in contravention of Nebraska law. The point values assigned the Non-Discretionary Questions were based upon the original evaluation criteria. As applied after the fundamental change to the evaluation criteria implemented in the Reevaluation, those values are arbitrary. Those arbitrary values render the evaluation criteria deficient under Nebraska law.

Moreover, it is unclear whether the change to the evaluation criteria even remedied the deficiency of the evaluation criteria. Specifically, the instructions contained on the scoring sheets used in the Reevaluation do not instruct the evaluators to score the answers based upon the substance of the disclosure rather than the completeness of the disclosure, as they were initially scored. Therefore, the evaluators scored the Non-Discretionary Questions, even in the Reevaluation, based upon whatever combination of completeness and substance the respective evaluators deemed fit. Accordingly, the Reevaluation did not result in a cured process under the evaluation criteria. The new evaluators should have been properly and adequately instructed to evaluate the responses based upon their substance.

Even considering the change to the evaluation criteria implemented in the Reevaluation, the number of points available in connection with the Non-Discretionary Questions is too small to allow for legitimate consideration of the Statutory Factors. Specifically, the Non-Discretionary Questions are the only portions of the RFP that elicit information relevant to the Statutory Factors, and each is worth a maximum of five (5) points. Accordingly, the Statutory Factors are

relevant in connection with a maximum of twenty (20) points out of a total of two thousand two hundred fifty (2,250), or about nine tenths of one percent (0.89%).

This issue is further exacerbated by DAS's affirmative approval of bidders' ability to limit consideration of the Statutory Factors. WellCare of Nebraska, Inc. ("WellCare") submitted a protest dated February 19, 2016 ("WellCare's Protest") arguing that providing negative information in connection with only one section of the RFP where it was also relevant to one or more other sections of the RFP was improper. In its March 1, 2016 response to WellCare's Protest (the "WellCare Response"), SPB found "that the bidders responded to the referenced sections of the RFP appropriately" apparently because "[t]he information was disclosed." This response ignores the fact that disclosing information in response to only one question of the RFP improperly prevents the evaluators from using that information in scoring other questions to which such information is responsive and relevant.

A bidder can effectively limit consideration of the Statutory Factors. Based on the WellCare Response, any negative information needed to be included in response to only one (1) question. This would further limit the number of points impacted by such information, which Nebraska law expressly requires to be considered, to just five (5) points out of two thousand two hundred fifty (2,250), or about two tenths of one percent (0.02%) of the total. A bidder could potentially prevent substantive consideration of the Statutory Factors altogether by including any relevant negative information in an unsolicited attachment.

This de minimis consideration of the Statutory Factors in the evaluation process, or lack of any consideration at all, does not comply with Neb. Rev. St. § 81-161, substantially or otherwise. See also 9 N.A.C. § 4-001.

What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. *Loontjer v. Robinson*, 266 Neb. 902, 914, 670 N.W.2d 301, 310 (2003) (Hendry, C.J., concurring in the result). Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. *Id.*

The purpose of Neb. Rev. St. § 81-161(2) is to ensure that the Statutory Factors are considered in determining the lowest responsible bidder. That purpose cannot be shown to have been served where bidders can limit the impact of the Statutory Factors to less than one percent (1%) under the evaluation criteria, or eliminate their consideration altogether.

Specifically, Nebraska Total Care disclosed pending Kentucky litigation in which an affiliate has been sued for damages potentially exceeding One Hundred Million Dollars (\$100,000,000.00) (*Kentucky Spirit Health Plan Inc. v. Commonwealth of Kentucky*, Franklin Circuit Court, Division 1, Civil action No. 12-CI-01373) and a March 9, 2015 determination letter issued by the Secretary of the Kentucky Cabinet for Health and Family Services (the "Secretary") finding an affiliate owed the Commonwealth of Kentucky Forty Million Dollars (\$40,000,000.00) in damages plus prejudgment interest. Both of these items were disclosed in response to the Non-Discretionary Question found at V.A.2.b of the RFP calling for disclosure of all "judgments, litigation or other potential reversals" (the "Judgments Question"). The determination letter issued by the Secretary was not disclosed in response to the later request that

the bidders "Identify and describe any regulatory action or sanction, including any monetary or non-monetary sanctions imposed by any federal or state regulatory entity against the MCO's organization within the last five years" (the "Regulatory Question"). By disclosing these items in response to only the Judgments Question and not the Regulatory Question, even though the Regulatory Question called for disclosure of the Secretary's action, Nebraska Total Care effectively limited consideration of the Statutory Factors.

SPB guaranteed that the negative information would be considered in response only to the Judgments Question by instructing the evaluators where to find the responses related to the Regulatory Question and not referencing Nebraska Total Care's response to the Judgments Question, thus preventing the evaluators from considering the Secretary's action in scoring the Regulatory Question, despite the fact that it was directly responsive to the Regulatory Question. See e-mail correspondence from Ms. Courtney Mason sent Wednesday, March 2, 2016 at 6:57 PM, attached hereto as Exhibit "A" and incorporated herein by this reference.

WellCare of Nebraska disclosed the termination of its affiliate's contract with the Iowa Department of Human Services on December 18, 2015 (the "WellCare Termination") in response to two questions. As a result of those disclosures, the WellCare Termination was relevant to the awarding of up to ten (10) points out of a total available of two thousand two hundred fifty (2,250), or less than half of one percent (0.44%). This is not sufficient to allow for proper consideration of the Statutory Factors.

Just as on the Nebraska Total Care disclosures, SPB provided poor guidance to the new evaluators on locating the responses in WellCare's proposal relevant to certain questions. In this instance, in an e-mail dated March 3, 2016 at 8:07 AM, a copy of which is attached hereto as Exhibit "B" and incorporated herein by this reference, Ms. Mason e-mailed the new evaluators page references within the WellCare proposal that supposedly related to the questions found on Line 8 of the scoring sheets, "risk bearing relationships;" Line 9, "past regulatory actions, sanctions or deficiencies history;" Line 10, "criminal investigation history;" and Line 11, "reinsurance arrangements." The page references provided in Ms. Mason's e-mail, however, were all located within the "Staffing Requirements" section of WellCare's proposal. None of them related to the referenced questions at all. Accordingly, it would appear that the new evaluators, based upon SPB's direct guidance, reviewed the wrong sections of WellCare's proposal in evaluating the responses to certain questions.

Because of this de minimis consideration of the Statutory Factors and bidders' ability to restrict their quantitative influence on the decision, along with SPB's faulty guidance and instruction provided to the evaluators, the RFP and the evaluation criteria do not comply with Neb. Rev. St. § 81-161(2), and the Award should therefore be withdrawn and the RFP should be rescinded and reissued in full compliance with Nebraska law.

II. EVEN ABSENT THE DEFICIENCIES IN THE FORMAT OF THE EVALUATION CRITERIA, THE LACK OF PROPER OVERSIGHT AND CONTROL RESULTED IN AN ARBITRARY AWARD.

Because the evaluators were not provided proper instruction, guidance or oversight, there was no evaluation framework that provided a common standard by which to judge the merit of the competing proposals. Because there was no common standard by which to judge the merit of the competing proposals, the RFP and the evaluation criteria used in connection therewith led to an arbitrary result. Because the RFP and the evaluation criteria rendered an arbitrary result, they are deficient under Nebraska law. The Award should be withdrawn and the RFP should be rescinded and reissued in full compliance with Nebraska law.

The RFP and the evaluation criteria violated Nebraska law, as they failed to meet the requirements set forth in the Manual. The Manual states that the evaluation committee should meet prior to conducting evaluations “so each member of the committee has a clear understanding of the scoring process and how points are assigned based on the evaluation criteria.” Manual, III.F.12.a, p. 17. SPB is tasked with ensuring that the RFP is free “from ambiguities, inconsistencies, or unduly restrictive specifications, and that all evaluation criteria are in a measurable format.” Manual, III.F.5.c, p. 14. “Together, the proper identification of and assignment of points to the evaluation criteria will form an evaluation framework that will provide the agency with a common standard by which to judge the merit of the competing proposals. This allows the agency to rank the proposals received while simultaneously offering bidders a fair basis of comparison.” Manual, Section III.H.1, p. 20.

From the extreme variation among evaluators as to the scores awarded in the various categories, as detailed in Section II of the Prior Protest, it is clear there was no “common standard by which to judge the competing proposals” and that bidders were not offered “a fair basis of comparison.” See Manual, *supra*.

In the Response, SPB maintains, “multiple evaluators are used to provide a range of independent evaluations.” Response, Section B, p. 1. In the WellCare Response, SPB provides more explanation of its position. “Multiple evaluators are used to provide a range of subjective opinion. Inconsistencies are expected and desired, based upon the opinion of the evaluator. The integrity of the process is not to guide the scoring, but to allow it to occur on the basis of an independent subjective evaluation.” See WellCare Response, Section B.3, p. 2.

But allowing the scoring “to occur on the basis of an independent subjective evaluation” was inconsistent with the Manual, and therefore violated Nebraska law. The Manual provides for “a common standard” and “a fair basis of comparison,” and explicitly advises “[t]he evaluation criteria must be in terms that can be measured and evaluated. Avoid words that are subjective, arbitrary, or too general.” See Manual, Section III.H.1, p. 20; Section III.F.3.b, p. 13. In the WellCare Response, SPB touts the subjective nature of the evaluation criteria used and the attendant inconsistencies among evaluators.

The lack of appropriate instruction, guidance and oversight resulted in no common standard or fair basis for comparison, as required under Nebraska law, and thus an arbitrary

result. Because the Award was arbitrary, it should be withdrawn and the RFP should be rescinded and reissued in full compliance with Nebraska law.

To illustrate the arbitrary scoring of the RFP, the evaluators were not provided any guidance regarding what responses were desirable or preferable. Rather, DHHS and DAS abdicated the responsibility to ensure that "each member of the committee has a clear understanding of the scoring process and how points are assigned based on the evaluation criteria," as spelled out in the Manual, in order to "allow [the scoring] to occur on the basis of an independent subjective evaluation." See Manual, III.F.12.a, p. 17; WellCare Response, *supra*. Each evaluator drew such evaluator's own conclusions about the appropriate interpretation of each question and its intent, the optimal answer, the relative value of that answer and any variation therefrom, and the appropriate number of points to accurately reflect that value.

For example, Section IV.X.1 of the RFP required the bidders to describe their preliminary implementation plans. This question was worth eighty (80) points, about three and a half percent (3.56%) of the total available under the RFP. In connection with this question, Meridian received one evaluator's highest score, and received two evaluators' lowest scores. Evaluator 2 on Team 2 subjectively felt that Meridian's Preliminary Implementation Plan was the best of the six bidders, whereas Evaluators 1 and 5 felt that it was the worst. This is a strong indication that there was no common standard applied by the evaluators in connection with this question, and that the bidders were not offered any fair basis for comparison. As detailed in Section II of Arbor Health's Prior Protest, over half of the questions in the RFP resulted in variance of rank of four or five places as to at least one bidder.

Not only was the basis of comparison subjective, the point scale was subjective as well. Evaluators 1 and 5 awarded Meridian forty-five (45) fewer points than they awarded their highest-scoring bidder for this question. Evaluator 2 awarded Meridian a mere two (2) points more than the lowest-scoring bidder for this question. The result is that whatever factor or factors on which Evaluators 1 and 5 based their awards arbitrarily took on much greater importance than whatever factor or factors on which Evaluator 2 based awards. There was no "common standard by which to judge the competing proposals" and each member of the evaluation committee did not have "a clear understanding of the scoring process and how points are assigned based on the evaluation criteria." See Manual, Section III.H.1, p. 20; III.F.12.a, p. 17. The arbitrary nature of this process rendered the RFP and the evaluation criteria deficient under Nebraska law.

Further complicating the application of the evaluation criteria is the lack of any guidance provided to the evaluators as to what information should be included in which of the various responses. For example, the Non-Discretionary Question found at Section V.A.2.g required a description of any termination of a contract for default and the one found at V.A.2.b required disclosure of any and all judgments, litigation or other real or potential reversals. But the evaluators were apparently not provided any guidance as to whether or how responses to these two questions should relate to one another or overlap. Evaluators' interpretation of whether a particular matter should be disclosed in response to one and not the other, both, or neither of these questions may differ. Bidders' interpretations could, and did, also differ.

While DHHS and DAS sought to rely upon a "range of subjective opinion" in creating the evaluation criteria for the RFP, the arbitrary nature of those subjective opinions on so many levels, from the most appropriate answer to a question, to the scaling of points awarded, to the appropriate information to be included in a response, rendered the evaluation criteria and the results reached thereunder wholly arbitrary. The evaluation criteria did not result in an evaluation framework that provided a common standard by which to judge the merit of the competing proposals or a fair basis of comparison, as required by Nebraska law. The results were arbitrary.

For the foregoing reasons, the Award should be withdrawn and the RFP should be rescinded and reissued in compliance with Nebraska law.

Arbor Health hereby incorporates by reference certain documents referenced herein, as follows:

1. Prior Award
2. Prior Protest
3. Response
4. WellCare's Protest
5. WellCare Response
6. Withdrawal
7. Award

Exhibit "A" (attached): Ms. Courtney Mason E-mail of March 2, 2016

Exhibit "B" (attached): Ms. Courtney Mason E-mail of March 3, 2016

Sincerely,



J. Michael Jernigan
President

From: Mason, Courtney
Sent: Wednesday, March 2, 2016 6:57 PM
To: Broz, Jerry; Stahly, Mary; Gekas Steeby, Catherine; Coan, Flora; McClintick, Kimberly
Cc: Thompson, Michelle; Fleming, Teresa
Subject: Guidance on Specific Nebraska Total Care Responses-8,9,10,11

Good Evening, Evaluators-

An evaluator pointed out to me that it may be a bit difficult to locate the proposal responses related to questions on lines 8, 9, 10, and 11 of your score sheets. I am sending you specific locations for each proposal response separately so that those who may be working this evening can use them as quickly as I'm able to provide them.

Responses for NTC on these questions can be found:

Line 8: Nebraska Total Care 1 of 3, pdf page 803

Line 9: Nebraska Total Care 1 of 3, pdf pages 804-828

Line 10: Nebraska Total Care 1 of 3, pdf page 829

Line 11: Nebraska Total Care 1 of 3, pdf page 831

Please let me know if you have any questions.

I will provide these pages for the remaining two bidders, UHC and WellCare tomorrow by 10am.

Thanks,

Courtney Mason

MLTC Special Projects Manager-DHHS

301 Centennial Mall South, Fifth Floor

Lincoln, NE 68509

(402) 471-9338

courtney.mason@nebraska.gov



From: Mason, Courtney
Sent: Thursday, March 3, 2016 8:07 AM
To: Broz, Jerry; Stahly, Mary; Gekas Steeby, Catherine; Coan, Flora; McClintick, Kimberly
Cc: Thompson, Michelle; Fleming, Teresa
Subject: Guidance on Specific WellCare Responses-8,9,10,11

Good Morning, Evaluators-

An evaluator pointed out to me that it may be a bit difficult to locate the proposal responses related to questions on lines 8, 9, 10, and 11 of your score sheets. I am sending you specific locations for each proposal response separately.

Responses for WellCare on these questions can be found:

Line 8: WellCare 1 of 2, pdf page 296

Line 9: WellCare 1 of 2, pdf pages 297-305

Line 10: WellCare 1 of 2, pdf pages 306-308

Line 11: WellCare 1 of 2, pdf pages 309-310

Please let me know if you have any questions.

Thanks,

Courtney Mason

MLTC Special Projects Manager-DHHS
301 Centennial Mall South, Fifth Floor
Lincoln, NE 68509
(402) 471-9338
courtney.mason@nebraska.gov

